Myths About Nursing Homes

Myth: "We can't admit John unless John Jr. signs as a 'Responsible Party.'"

Fact: Nursing Home Reform Law prohibits a nursing facility from requiring a third-party guarantee of payment as a condition of admission or continued stay. *Section 483.12(d) of Title 42 of the Code of Federal Regulations.*

Myth: "The nursing staff will determine the care that John will receive."

Fact: Assessments are used for development of a comprehensive care plan, which must be prepared initially within seven days after completion of the first full assessment. Every three months, care plans must be reviewed and, if necessary, revised. A resident and/or resident's representative has a right to participate in a care plan conference. *Section 483.20(b), (k) of Title 42 of the code of Federal Regulations.*

Myth: "John can't receive Medicare reimbursement because we have determined that he needs custodial care only."

Fact: Medicare pays for up to 100 days, if resident –

1) Is hospitalized for at least three nights;
2) Needs skilled nursing services or skilled rehabilitation services. Days 21 through 100 have daily co-payment of $101.50.

John can force the facility to submit a bill. Resident cannot be charged for any amount for which Medicare subsequently may pay.

Myth: "We can't give John therapy services because he isn't making progress."

Fact: This denial may be blamed on medical judgment or Medicare rules. If the denial is based on medical judgment, the facility should be informed that a facility is responsible for trying to "maintain" a resident's condition: "a facility must ensure that [a] resident's abilities in activities of daily living do not diminish unless circumstances of the individual's clinical condition demonstrate that diminution was unavoidable." *Section 483.25(a) (1) of Title 42 of the Code of Federal Regulations (emphasis added).*

If the denial is blamed on Medicare rules, there are two rebuttal points to be made:

1) Payment source should not affect the care provided. *Section 483.12(c) (1) of Title 42 of the Code of Federal Regulations.*
2) Medicare reimbursement does not necessarily require "progress." Resident must need "skilled nursing services" or "skilled rehabilitation services." *Sections 409.31-409.35 of Title 42 of the Code of Federal Regulations.*

Myth: "We can't give John therapy services because his Medicare reimbursement has expired, and Medicaid doesn't pay for therapy."

Fact: An attempt to tie care to payment source must be resisted. Appropriate therapy should be provided regardless of the form of payment.

1) Services are required. Federal law requires that resident receive services necessary "to attain or maintain the highest practicable physical, mental, and psychosocial well-being." *Section 483.25 of Title 42 of the Code of Federal Regulations.*
2) Services must not vary by source of payment. A nursing facility "must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services required under the State [Medicaid] plan for all individual regardless of sources of payment. *Section 483.12(c) (1) of Title 42 of the Code of Federal Regulations (emphasis added).*
3) Therapy must be provided under a Medicaid per diem rate. The Surveyors' Guidelines to Section 483.45(a) of Title 42 of the Code of Federal Regulations provide that therapy services must be provided "even when the services are not specifically enumerated in the State [Medicaid] plan." (Emphasis added.)

Myth: "Because John is no longer eligible for Medicare reimbursement, he must leave his Medicare-certified bed."

Fact: A nursing facility may seek Medicare certification for all or some of the facility's beds. Distinct-part certification does not prevent a bed from being used for a resident paying privately or through Medicaid. A resident has the right to refuse a transfer within a facility if the purpose of the transfer is to move the resident to or from a Medicare-certified bed. *Section 483.10(o) of Title 42 of the Code of Federal Regulations.*

Myth: "John must be tied into his chair so that he doesn't wander away from the facility."

Fact: A resident has the right to be free from "any physical or chemical restraint imposed for purposes of discipline or convenience and not required to treat the resident' medical symptoms." *Section 483.13 of Title 42 of the code of Federal Regulations.* The term "physical restraint" includes (among other things) vest restraints, hand mitts, seat belts, bed rails, and chairs that are angled to prevent the resident from getting out. *Surveyor's Guideline to Section 483.13(a) of Title 42 of the Code of Federal Regulations, Appendix PP to CMS State Operations Manual.*

Myth: "John has to wake up at 6:00 a.m. because we don't have enough nurse aides to accommodate individual schedules."

Fact: Nursing Home Reform Law is meant to assure that residents are treated as individual human beings.

- "A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life." *Section 483.15 of Title 42 of the Code of Federal Regulations.*

- A resident has the right "to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered." Sections 1395i-3(c) (1) (A) (v) (I) and 1396r (c) (1) (A) (v) (I) of Title 42 of the United States Code (emphasis added).
- "[A] resident has the right to [c]hoose activities, schedules, and health care consistent with his or her interest, assessments, and plan of care." *Section 483.15(b) of Title 42 of the Code of Federal Regulations.*

Myth: "We must insert a feeding tube into John because he is not finishing his meals during mealtime."

Fact: A facility must assist a resident in maintaining the resident's ability to eat. *Section 483.25 of Title 42 of the Code of Federal Regulations.* Surveyor's Guidelines mention specific steps that a facility might take, including: prompting the resident to eat; providing therapy to improve swallowing skills; or simply feeding the resident. *Surveyor's Guideline to Section 483.25, Appendix PP to CMS State Operations Manual.* Tube feeding should be done only if absolutely necessary. *Section 483.25(g) of Title 42 of the Code of Federal Regulations.*

Myth: "John's children can visit only during visiting hours."

Fact: A limitation on visiting hours conflicts with the idea that a nursing facility should be "home." "[I]mmediate family or other relatives" have the right to visit at any time. *Section 483.10(j) of Title 42 of the Code of Federal Regulations.* For visits late at night, the Surveyors' Guidelines to Section 483.10(j) suggest that visits might take place outside of the resident's room.

Myth: "John must pay any amount set by the facility for 'extra' charges."

Fact: Amount of charges are limited by the admission agreement, based on standard principles of contract law. Medicare and Medicaid must be accepted as payment in full. *Section 483.10(c) of Title 42 of the Code of Federal Regulations.*

Myth: "We have no available space in which residents or family members could meet."

Fact: Residents and residents' family members have the right to form resident councils and family councils, respectively. If such a group forms, a facility is obligated to provide the group with a private meeting space, and must designate a facility employee as a liaison with the group. *Section 483.15 of Title 42 of the Code of Federal Regulations.* A facility must seriously consider, and respond to, all complaints or recommendations made by a resident or family council. *Section 483.15 of Title 42 of the Code of Federal Regulations.*

Myth: "John must leave the facility because he is a difficult resident."

Fact: Under the Nursing Home Reform Law, there are only six legitimate reasons for eviction:

- The resident has failed to pay.
- The resident no longer needs nursing facility care.
- The nursing facility is going out of business.
- The resident's needs cannot be met in a nursing facility.
- The resident's presence in the nursing facility endangers others' safety.
- The resident's presence in the nursing facility endangers others' health.

Section 483.12(a) of Title 42 of the Code of Federal Regulations.

"Difficulty" is not a justification for eviction. Nursing facilities exist in order to care for people with physical and mental problems.

Myth: "John must leave the facility because he is refusing medical treatment."

Fact: A nursing facility resident, like any other individual, has a constitutional and common-law right to refuse medical treatment. Accordingly, an involuntary transfer or discharge cannot be based on a resident's refusal of treatment.

CMS has stated that:

- "Refusal of treatment would not constitute grounds for transfer, unless the facility is unable to meet the needs of the resident or protect the health and safety of others." *Surveyor's Guideline to Section 483.12(a)(2) of Title 42 of the Code of Federal Regulations, Appendix PP to CMS State Operations Manual.*
- "A facility may not transfer or discharge a resident for refusing treatment unless the criteria for transfer or discharge are met." *Surveyor's Guideline to Section 483.10(b)(4) of Title 42 of the Code of Federal Regulations, Appendix PP to CMS State Operations Manual.*

Source: Adapted from materials developed by Eric Carlson at the National Senior Citizens Law Center.